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No. 96-1811

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1996

TERRY MORRIS, ET AL.,

Petitioners,

v.

JOHN L. WRIGHT, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPLY BRIEF

BETTY D. MONTGOMERY
Attorney General

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
BRIAN M. ZETS
Assistant Attorneys General
30 E. Broad Street, 17th Floor
Columbus, Ohio 43215-3428
614/466-8980
Counsel for Petitioners
(additional counsel on next page)

17pp

FRANK J. KELLEY
Attorney General
THOMAS L. CASEY
Solicitor General
SUSAN PRZEKOP-SHAW
Assistant Attorney General
Corrections Division
P.O. Box 30216
Lansing, MI 48909
517/335-7021
Counsel for Appellees in Thaddeus-X v. Blatter

JOHN KNOX WALKUP
Attorney General
MICHAEL E. MOORE
Solicitor General
MICHAEL W. CATALANO
Associate Solicitor General
Office of the Attorney General
500 Charlotte Avenue
Nashville, TN 37243-0497
615/741-3499
Counsel for Appellees in Corley v. Bennett

JOHN T. DAMRON
Attorney at Law
Commonwealth of Kentucky
Department of Corrections
Office of General Counsel
200 State Office Building
Frankfort, KY 40601
502/564-2024
Counsel for Appellees in Birdo v. Berry

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REPLY BRIEF OF PETITIONERS

In their brief in opposition, respondents offer two primary explanations why the Court should deny certiorari: They contend that the case is moot and that the decision below does not implicate a lower-court conflict over the applicability of the Prison Litigation Reform Act ("PLRA" or "Act") to pending cases. Neither explanation is persuasive. And neither explanation undermines the arguments in favor of certiorari raised by the four petitioning States -- Kentucky, Michigan, Ohio and Tennessee -- or those offered by the 19 other States that filed an *amicus* brief supporting the petition. *See Amicus* Brief of Maryland, *et al.*

1. Respondents initially argue that the Court should deny certiorari because the action is moot. Opp. Br. 1-2. That is wrong as a matter of fact and law.

Factually, respondents' mootness argument contains a vital missing element: One of the consolidated actions in this case continues to be a live controversy. The Sixth Circuit, it is true, dismissed three of the four inmate claims in separate opinions after consolidating these cases to address the retroactivity of the exhaustion requirements of the PLRA. But, importantly, the appellate court did not dismiss the fourth action -- *Thaddeus-X, et al. v. Blatter, et al.* -- which remains very much alive in the Sixth Circuit and may well continue to be litigated in the district court after that. *See Thaddeus-X, et al. v. Blatter, et al.*, ___ F.3d ___, 1997 U.S. App. LEXIS 14468 (6th Cir. June 12, 1997).

Legally, respondents' mootness claim is even less tenable. It simply does not matter that just one of the four consolidated actions remains live, or that little good allegedly can come from even that claim. The claimant in *Thaddeus-X* has chosen not to dismiss his case and, until he does, respondents cannot even begin to make out a colorable claim that this consolidated dispute no longer presents an Article III

case or controversy. Not surprisingly, under these circumstances, respondents have yet to cite a single case to support this argument. In fact, no such authority exists.

At any rate, even if respondents had lost all four collateral actions in the Sixth Circuit, the court's separate retroactivity decision in this consolidated action would still present an Article III controversy. Just because a petitioner prevails on the merits of an underlying substantive dispute does not invariably moot the case on all other issues. As *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 333-334 (1980), observed,

> appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits so long as that party retains a stake in the appeal satisfying the requirements of Art. III.

(Footnote omitted).

The reason for this approach is straightforward. When litigants win the battle (here, rejection of three of the individual inmate claims) but lose the war (here, no application of the PLRA to pending cases), they face a compelling *stare decisis* predicament. In this instance, for example, the States obtained a negative ruling affecting thousands of other claims, as Judge Merritt noted in dissent, Pet. at A-19, and yet under respondents' view the States would have no realistic mechanism for challenging the decision. This is precisely why *Roper* ruled the way it did. *Id.* at 336-337. Nor is *Roper* alone on this point. Cases pre-dating it and post-dating it, and cases from this Court and the lower courts, have reached the same sensible conclusion.

See Electrical Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939); *Edward J. DeBartalo Corp. v. National Labor Relations Board*, 463 U.S. 147, 153 n.5 (1983); *International Brotherhood of Electrical Workers v. Interstate Commerce Commission*, 862 F.2d 330, 334 (D.C. Cir. 1988).

In the end, respondents' mootness claim is simply mistaken. And, because this is the only jurisdictional or procedural bar that respondents have raised, the argument only highlights the fact that no obstacle stands in the way of using this case as a vehicle to address the important questions presented.

2. Respondents next argue that the petition does not implicate a split of authority in the lower courts, either on the first or the second question presented. Opp. Br. 4-7. They are wrong on both fronts.

a. The first question presented is whether Congress textually resolved the retroactivity issue by providing that "no action shall be brought" until a prisoner has exhausted his or her administrative remedies. 42 U.S.C. 1997e(a). Respondents offer no meaningful response to the conflict of authority between the Sixth Circuit's ruling in this case and the lower-court rulings involving other PLRA provisions that also refer to the "bringing of causes of action." Not only did these courts engage in an analysis of virtually identical provisions of the PLRA, but their analyses also specifically cover section 1997e(a) as well. For example, the Second Circuit's analysis concerning section 1915(a) and (b)'s restrictions on "bring[ing] a civil action" broadly contradicts the Sixth Circuit's analysis: "[T]he PLRA contains no effective date provisions and none of its provisions gives any explicit indication as to whether the act would have any application to pending appeals." *Covino v.*

Reopel, 89 F.3d 105, 106 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1265 (1997). *See also Leonard v. Lacy*, 88 F.3d 181 (2d Cir. 1996). The Fifth Circuit likewise broadly found "that Congress specified no effective date for the PLRA." *Adepegba v. Hammons*, 103 F.3d 383, 385 (5th Cir. 1996). Indeed, in the short time since the petition was filed, this split has deepened. The Fourth Circuit recently determined that §803 of the PLRA, which contains the amendments to §1997e, lacks a textual preference on the question of retroactivity. "[N]othing in §803 of the P.L.R.A.," the court found, "expressly prescribes its reach" for purposes of the first stage of the *Landgraf* analysis. *Alexander S. v. Boyd*, 113 F.3d 1373, 1387 (4th Cir. 1997).

Nor are respondents correct in suggesting that this growing split of authority is inapposite. As the appendix to this brief illustrates, the division of authority concerns other sections that, like section 1997e(a), use the operative word "bring." *See* Appendix. In view of the Sixth Circuit's focus on this very verb in the first stage of its *Landgraf* analysis, other like provisions of the PLRA plainly are covered by its analysis.

Since the petition was filed, moreover, another lower court confirmed this point and specifically disagreed with the Sixth Circuit's decision in doing so. Adhering to the Second Circuit's decision in *Covino*, which concerned 1915(a) and (b)'s restrictions on "bring[ing] a civil action," the court held that the amendment to §1997e(a) does in fact apply to cases pending on the date of their enactment.

> Given the reasoning of the Second Circuit in *Covino*, I must decline to follow *Wright*, and must hold that the exhaustion of remedies clause of the P.L.R.A. does apply

> retroactively. First, *Congress' intent is not apparent in the wording of the P.L.R.A.* The Sixth Circuit in *Wright* relied on the use of the words "shall be brought" to demonstrate that Congress intended to apply the statute prospectively. *Id.* at 418. By contrast, the Second Circuit in *Covino* held that Congress' intent is unclear in Section 804(b)(1) of the P.L.R.A. 89 F.3d at 106. As noted above, this section of the P.L.R.A. uses the same wording -- "shall be brought" -- as the exhaustion of remedies clause. The Second Circuit's interpretation is not only controlling but also, from a grammatical perspective, compelling. The verb "shall," as it appears in the P.L.R.A., is used in an imperative sense; it is not in the future simple tense as the Sixth Circuit reading would require. With a negative attached -- "no action shall be brought" -- the plain sense of the statute is to bar prisoner lawsuits unless administrative remedies have been exhausted.

Salahuddin v. Mead, 1997 U.S. Dist. LEXIS 8895, at *8-9 (S.D.N.Y. June 26, 1997) (emphasis added).

The analysis of one provision of the PLRA concerning the "bringing" of inmate actions thus bears directly on other similarly-worded provisions. Accordingly, whether one looks at the direct conflict involving the Sixth Circuit's

analysis and *Salahuddin* or the broader one concerning other similarly-worded provisions of the PLRA, the conclusion is the same: The lower courts now need, and presumably will continue to need, guidance on the point.

b. The petition also showed a conflict of authority concerning the second question presented -- namely, whether the PLRA applies to pending cases under the *Landgraf* default rules. Here, too, the opposition brief comes up short. With the exception of arguing that cases construing the jurisdictional nature of the Federal Torts Claims Act ("FTCA") are inapposite, Opp. Br. 7-8, they offer no response to the burgeoning lower-court disagreement about how to apply the *Landgraf* default rules in the context of the PLRA. These cases also are extremely relevant -- since the procedural or jurisdictional nature of an amendment has special meaning under *Landgraf*. Indeed, in contrast to the Sixth Circuit, several lower courts have specifically held that §1997e(a) is jurisdictional, and others have found the procedural nature of the changes to the PLRA to be dispositive. Pet. 13-14. Similar decisions, once again, have been issued since the petition was filed. *See Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) (specifically rejecting Sixth Circuit's analysis of § 1997e(a)); *Morgan v. Arizona Dept. of Corrections*, 1997 U.S. Dist. LEXIS 8400 (D. Ariz., May 31, 1997) (characterizing § 1997e(a) as jurisdictional); *Turner v. Boutista*, 1997 U.S. Dist. LEXIS 8373 (N.D. Cal. June 10, 1997) (same).

3. Nor can there be any doubt that the questions presented are national in scope and important in nature. Conspicuously missing from the brief in opposition is any argument to the contrary. As shown in the petition, Pet. 6-8, 15, the dispute raises questions casting a shadow over thousands of cases throughout the country. As the presence

of four States on the petition suggests, and as the Maryland *amicus* brief on behalf of 19 other States confirms, this is an important issue with wide implications -- both with respect to the retroactivity of the exhaustion requirements of the PLRA and of the other provisions of the Act using similar operative language. In view of the substance of the conflict of authority when the petition was filed, the growth in the conflict since, and the likely development of the conflict as the summer progresses, it seems exceedingly unlikely that the issue will go away.

4. Finally, respondents offer arguments on the merits as to why the PLRA generally, or even section 1997e(a) specifically, should not apply to pending cases. *See* Opp. Br. 2-3, 8-11. These of course are not compelling grounds for denying the writ in view of the importance of these questions and of the difficulty the lower courts have had in resolving them. Nonetheless, they merit a brief response.

First, respondents note that the PLRA contains 10 sections, only one of which provides specifically for retroactive application of the law. Accordingly, the argument goes, one must infer that Congress did not intend the other nine provisions to apply to pending cases. Opp. Br. 2-3. This is wrong under *Landgraf*, 511 U.S. at 258-262, and indeed even the Sixth Circuit was agnostic about this argument, *Wright v. Morris*, ("[s]uch an argument would normally not be dispositive") (Pet. at 4-7).

The section on which respondents rely simply deals with the States' authority to alter prison administration consent decrees, many of them decades old. Congress thus had a unique explanation for focusing on the retroactivity of the provision since it dealt with injunctive decrees that in many cases were finally appealed long before the PLRA's enactment. That situation of course does not exist with the

other sections of the PLRA, where the States are arguing only that pending cases are affected by its provisions, not that finally-appealed rulings must be revisited under the section.

Next, respondents argue as a matter of policy that Congress cannot have intended that the exhaustion provision be applied retroactively in view of the statute of limitations problems it will generate. Even assuming the relevance of this inquiry, it is not persuasive. A ruling for the States puts them to a choice: They can either (i) exercise their exhaustion rights by waiving limitations bars and providing a venue for exhaustion or (ii) allow the federal action to proceed. But the whole point of the PLRA was to give the States greater control over this very inquiry. At all events, the decision of the four States involved in this case to seek certiorari and of 19 other States to support them in this effort directly undermines respondents' suggestion that the retroactive application of section 1997e(a) will have little effect.

Finally, the Court's recent decisions in *Lindh v. Murphy*, 65 U.S.L.W. 4557 (1997), and *Hughes Aircraft Co. v. United States*, 65 U.S.L.W. 4447 (1997), do not alter these conclusions. *Lindh* determined whether the amendments to 28 U.S.C. Chapter 153, made by the Antiterrorism and Effective Death Penalty Act ("AEDPA"), apply to pending cases. In concluding that they do not, the Court found that Congress textually limited application of the provisions to later-filed cases. That holding, the Court determined, followed from the negative implication of Congress's decision to make another portion of AEDPA applicable to pending cases. In particular, the Court found that no alternative explanation existed for Congress's decision to specify that one portion of the Act (but not others) applied to pending cases. 65 U.S.L.W. at 4560-4561. By contrast, as

shown above, no such inference exists here. Congress had every reason to specify the retroactivity of one provision of the PLRA but not the others. As one post-*Lindh* decision has noted,

> a plain reading of Section 802 shows that Congress inserted such specific retroactive language in order to emphasize the unusually far-reaching consequences of this retroactivity provision. The provision seems to extend Section 802 even to injunctive remedies already in place, and even if the case in which the relief was granted has long been concluded.

Salahuddin v. Mead, 1997 U.S. Dist. LEXIS 8895 at **9-10 (footnote omitted).

Hughes Aircraft is no more helpful. At issue was whether amendments to the federal false claim statutes applied to pending cases. Notably, this was a change in law that created liability that did not previously exist (a core consideration under *Landgraf*, 511 U.S. at 283-285), while the PLRA simply alters the prospective relief inmates may obtain in federal court. The former is substantive and imposes liability for primary conduct that would not have been actionable pre-enactment; the latter is procedural and simply affects the nature of the prospective relief federal courts have authority to give.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, we respectfully submit that the writ should be granted.

Respectfully submitted,

BETTY D. MONTGOMERY
Attorney General of Ohio

FRANK J. KELLEY
Attorney General
THOMAS L. CASEY
Solicitor General
SUZAN PRZEKOP-SHAW
Assistant Attorney General
Corrections Division
P.O. Box 30216
Lansing, MI 48909
517/335-7021
Counsel for Appellees in Thaddeus-X v. Blatter

JOHN KNOX WALKUP
Attorney General
MICHAEL E. MOORE
Solicitor General
MICHAEL W. CATALANO
Associate Solicitor General
Office of the Attorney General
500 Charlotte Avenue
Nashville, TN 37243-0497
615/741-3499
Counsel for Appellees in Corley v. Bennett

JEFFREY S. SUTTON
State Solicitor
Counsel of Record
TODD R. MARTI
BRIAN M. ZETS
Assistant Attorneys General
30 E. Broad Street, 17th Fl.
Columbus, OH 43215-3428
614/466-8980
Counsel for Appellees in Wright v. Morris

JOHN T. DAMRON
Attorney at Law
Commonwealth of Kentucky
Department of Corrections
Office of General Counsel
200 State Office Building
Frankfort, KY 40601
502/564-2024
Counsel for Appellees in Birdo v. Berry

DATE: July 9, 1997

APPENDIX

CASES ON THE APPLICABILITY OF KEY PROVISIONS OF THE P.L.R.A. TO CASES PENDING AT DATE OF ENACTMENT

(1) 42 U.S.C. §1997e(a) (exhaustion of administrative remedies)

Second Circuit	*Salahuddin v. Mead*, 1997 U.S. Dist. LEXIS 8895 (S.D.N.Y. June 26, 1997) (applies)
Sixth Circuit	*Wright v. Morris*, 111 F.3d 414 (6th Cir. 1997) (does not apply)
Seventh Circuit	*Malone v. Godinez*, 1997 U.S. Dist. LEXIS 6201 (N.D. Ill., April 28, 1997) (does not apply)

(2) 28 U.S.C. §1915(a); and/or (b) (filing fee provisions)

Second Circuit	*Covino v. Reopel*, 89 F.3d 106 (2d Cir. 1996), *cert. denied*, 117 S.Ct. 1265 (1997) (applies)
Fifth Circuit	*Ayo v. Bathey*, 106 F.3d 98 (5th Cir. 1997) (applies)
Seventh Circuit	*Thurman v. Gramley*, 97 F.3d 185 (7th Cir. 1996) (does not apply)
Ninth Circuit	*Rodgers v. Deboe*, 950 F.Supp. 1024 (S.D. Cal. 1997) (does not apply)

Tenth Circuit	*White v. Gregory*, 87 F.3d 429 (10th Cir. 1996), *cert. denied*, 117 S.Ct. 528 (1996) (does not apply)

(3) 28 U.S.C. §1915(g) (denies pauper status to inmates who have previously abused that status)

Third Circuit	*Deutsch v. United States*, 1996 U.S. Dist. LEXIS 13937 (E.D. Pa., July 9, 1996) (does not apply)
Fifth Circuit	*Adepegba v. Hammond*, 103 F.3d 383 (5th Cir. 1996) (applies)
Sixth Circuit	*Witzke v. Hiller*, 1997 U.S. Dist. LEXIS 7180 (E.D. Mich., May 20, 1997) (applies)
Seventh Circuit	*Abdul-Wadood v. Nathan*, 91 F.3d 1023 (7th Cir., 1996) (does not apply)
Eighth Circuit	*Lyon v. Krol*, 940 F.Supp. 1433 (S.D. Iowa 1996) (applies)
Tenth Circuit	*Green v. Nottingham*, 90 F.3d 415 (10th Cir., 1996) (applies)

(4) 42 U.S.C. §1997(d) (limitations on attorneys' fees)

Fourth Circuit	*Alexander S. v. Boyd*, 113 F.3d 1373 (4th Cir. 1997) (applies)

Seventh Circuit	*Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996) (does not apply)
Eighth Circuit	*Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996) (does not apply)